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SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY OF JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS AND EDMUND A. MERTENS, INDIVIDUALLY AND AS COMPOSING THE CO-PARTNERSHIP FIRM OF "J. M. MERTENS & CO.," BANKRUPTS, PETITIONER,

vs.

JACOB M. MERTENS.

No. 209.

BRIEF FOR PETITIONER.

THIS CASE COMES HERE UPON THE RETURN OF A WRIT OF CERTIORARI, DIRECTED BY THIS COURT TO THE CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT, FOR THE PURPOSE OF REVIEWING AN ORDER AND DECREE OF SAID COURT, MADE DECEMBER 9, 1905, WHICH ORDER AND DECREE REVERSED THE ORDER AND DECREE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK, MADE ON SEPTEMBER 6, 1904, BY THE HON. GEORGE W. RAY, DISTRICT JUDGE. THE ORDER AND DECREE OF THE DIS-

TRICT COURT CONFIRMED THE REPORT OF CHARLES L. STONE, SPECIAL MASTER, MADE JUNE 7, 1904, WHICH REPORT FOUND THAT THREE LIFE INSURANCE POLICIES OF THE SEMI-TONTINE KIND IN THE AMOUNT OF $90,000, ISSUED BY THE EQUITABLE LIFE ASSURANCE SOCIETY UPON THE LIFE OF JACOB M. MERTENS, ONE OF THE BANKRUPTS, PASSED ABSOLUTELY BY VIRTUE OF THE BANKRUPTCY PROCEEDING TO THE TRUSTEE IN BANKRUPTCY, AND THAT SAID BANKRUPT HAD NO RIGHT, BY PAYING TO THE TRUSTEE A SUM WHICH WAS CLAIMED TO BE THE CASH SURRENDER VALUE THEREOF, TO TAKE AND HOLD SAID POLICIES FREE FROM THE CLAIMS OF CREDITORS. IN SHORT, THE DISTRICT COURT HELD THAT THESE POLICIES DID NOT COME WITHIN THE "PROVISO" OF SECTION 70-A-5, OF THE BANKRUPTCY ACT; THE CIRCUIT COURT OF APPEALS HELD THAT THEY DID.

STATEMENT OF CASE.

An involuntary petition in bankruptcy, based upon an admission of insolvency, was filed against Jacob M. Mertens and his sons individually and as composing the copartnership of J. M. Mertens & Co., on August 18, 1903, and an order was thereupon made on that day, appointing Albert K. Hiscock, of Syracuse, N. Y., receiver of the estates of said alleged bankrupts; on September 15, 1903, the proceeding culminated in an adjudication in bankruptcy against said Jacob M. Mertens and his sons, and on October 14, 1903, the said receiver, Albert K. Hiscock, was duly elected trustee of the estates of said

bankrupts, thereby succeeding as trustee to the rights which he had held as receiver. (Page 20.)

At the time of the filing of said involuntary petition in bankruptcy, Jacob M. Mertens held four policies of life insurance, all issued by The Equitable Life Assurance Society upon his life; of these policies three aggregating in amount $90,000, were each, in case of death, payable to Mr. Mertens' estate and the options, if he continued to live, were in favor of him alone; the tontine period provided for by each was twenty years; one was a semi-tontine policy, issued March 8, 1884, in the amount of $20,000 with a semi-annual premium of $293 and numbered 274,445. (Page 42.) Another was a free tontine policy, issued January 23, 1889, in the amount of $20,000, with an annual premium of $684 and numbered 415,768. (Page 47.) The other was a free tontine policy, issued February 15, 1889, in the amount of $50,000, with a semi-annual premium of $791.50 and numbered 417,171. (Page 51.) Prior to the beginning of the bankruptcy proceeding, the tontine period in the fourth policy had expired and it had thereupon been converted into a paid-up policy, payable to Mrs. Mertens. On account of its having been pledged as collateral, the trustee has no pecuniary interest in it and it may be eliminated from the discussion. (Page 74.)

At the time when the bankruptcy proceeding was instituted, these policies were all held by Jacob M. Mertens subject only to some claims against them which arose out of their having been assigned as collateral to loans. The

amount of these loans is set forth in the petition, (page 11) but they are immaterial to the question before the Court.

It will be noted that none of these policies have any cash surrender value provided by their terms (pages 75, 76); *also that all of these policies are "tontine" policies, that is, they are not life insurance policies only, but have a separate and distinct feature which makes them purely an investment* (see option No. 5 in each policy, pages 44, 48, 53), because each one specially provides by its terms that at the expiration of twenty years from its respective date, the insured, if living, shall have the choice of exercising one of several options; and in each case one of those options is the cancellation of the policy in consideration of a sum of money, which includes not only a fixed sum, but a part of the earnings of the policy, which earnings are not ascertainable until the end of the tontine period.

By reason of these options, the policies have a large actual value, which is much in excess of any amount which can be obtained from the company for their cancellation. For instance in the case of the Policy No. 274,445, Exhibit No. 5, the tontine period of which expired within six months from the adjudication in bankruptcy, the actual value above what the company would give was nearly $5500. (Page 33.)

The reason for this vast difference, as hereafter shown, is that from the very nature of these policies the company

is precluded until after the expiration of the tontine period from paying anything for the right of the holder of the policy to participate in profits, which right does not become absolute until the end of the tontine period. (Page 34.) For under the terms of these policies, those policy holders who keep up their premiums to the end of the period, share proportionately all profits which accrue because of lapses or defaults by others holding similar policies who fail to keep up their premiums for the twenty years. (Provision No. 4 in each policy.) On account of these facts, the trustee claims that it was not the intent of the proviso in §70 of the Bankruptcy Act to include policies of this class, and thereby give the bankrupt such valuable privileges while granting him immunity from his debts.

Some time after the bankruptcy proceedings and the appointment of the trustee, it developed that Jacob M. Mertens claimed that he still had an interest in these policies; therefore, a petition (page 8) was presented to the District Court, alleging that the trustee was the sole owner of these policies and praying that an order be issued by it, directed to Jacob M. Mertens, requiring him to assign said policies to the trustee, together with all of his claims therein, said order also to fix the rights and interests of the trustee in said policies. An answer to that petition (page 14) was filed by the bankrupt in which he set forth two inconsistent claims: First, that the policies never passed to the trustee and that the trustee has not and never had any interest whatever in

them. Second, that the policies have a cash surrender value within the meaning of the Bankruptcy Act, Section 70-a-5, and that upon payment of that cash surrender value to the trustee, he is entitled to take the policies free and clear from all further claim by the trustee or by creditors. Upon that petition and answer an order (page 18) was made by the District Court, referring the proceeding to Charles L. Stone, of Syracuse, N. Y., as Special Master, to hear the evidence and report to the Court the facts, with his opinion thereon.

Upon the hearing, the bankrupt called as a witness an insurance expert, Mr. Brainerd (page 23) for the purpose of showing that although the policies did not provide for any cash surrender value, still the Company would *voluntarily* pay a sum for the cancellation thereof, which sum the bankrupt claimed was in fact a cash surrender value and brought the policies within the terms of the proviso; but this witness on his cross-examination testified that the policies had a much larger actual value than the sum which the Company would pay for such a cancellation. (Page 33.)

During the pendency of the litigation, so that the policies might not become lapsed, an arrangement was made, whereby the trustee keeps up the premiums under an agreement that if the policies are finally found to belong to the bankrupt, then the sums so paid by the trustee with interest are to be a lien upon the policies. (Page 59.)

The case is illumined by a very full and able report by

the referee, which discusses the policies and their terms and which appears at page 73, and also by the opinion of the District Court, which appears at page 84. Both of these opinions hold that Mr. Mertens has no rights whatever in the policies, but that the same belong absolutely to the trustee; and an order and decree in conformity therewith was made by the District Court. (Page 90.)

The bankrupt thereupon filed with the Circuit Court of Appeals a petition for the review of that decision and also an appeal therefrom. The appeal was dismissed (page 103) but upon the petition for review the decree of the District Court was reversed. The Circuit Court of Appeals wrote an opinion which appears at page 102, a perusal of which will show that the Court was really in favor of affirming the decree of the District Court, but taking the peculiar ground that it was constrained to follow what appears to have been a chance remark of the Supreme Court in Holden vs. Stratton, 198 U. S., 214, which the Supreme Court itself at the time of making it said was *obiter,* the Circuit Court of Appeals reversed the decree against its own judgment and practically asked this Court to review the decision. (Page 105.)

Thereafter the trustee filed a petition for a writ of certiorari with this Court on February 23, 1906, which was granted. In that petition the errors of which he complained were that the Circuit Court of Appeals erred in holding:—

First, that the policies in question were embraced

within the meaning of the proviso contained in Section 70-a-5 of the Bankruptcy Act.

Second, that the policies had a cash surrender value.

Third, that after the adjudication, the bankrupt had any interest whatever in the policies.

Fourth, that the trustee was not the absolute owner of said policies free and clear from all claims of the bankrupt.

Fifth, in refusing to affirm the order directing the bankrupt to execute an assignment of said policies to the trustee.

Sixth, in refusing to affirm in all respects the order made by the District Court.

The question before the court, in short, is: Under Section 70-a-5 of the Bankruptcy Act, has the bankrupt any right or interest in policies of insurance, such as are described in the petition and commonly known as "tontine policies"?

POINT I. These policies are not strictly life insurance policies, but are investments. They have no cash surrender value within the meaning of the proviso in Section 70-a-5 of the Bankruptcy Act, and the bankrupt is not entitled to take them from the trustee upon the payment of what the bankrupt claims is the cash surrender value thereof.

Section 70-a-5 of the Bankruptcy Act, after providing for the transfer of title of assets from a bankrupt to the trustee, contains the following proviso:

"Provided, That when any bankrupt shall have any "insurance policy which has a cash surrender value pay- "able to himself, his estate, or personal representatives, "he may, within thirty days after the cash surrender "value has been ascertained and stated to the trustee by "the company issuing the same, pay or secure to the trus- "tee the sum so ascertained and stated, and continue to "hold, own, and carry such policy free from the claims "of the creditors participating in the distribution of his "estate under the bankruptcy proceedings, otherwise the "policy shall pass to the trustee as assets."

The construction of this proviso is necessary for the determination of this controversy and in construing it it is essential that the terms of the policies in question should be carefully examined.

As before stated, all of these policies, except policy No. 1, Exhibit 4, which has been eliminated from the case (page 74), were payable in case of death to Jacob

M. Mertens, his executors or assigns, and the investment feature by which certain options were received and made available at the end of twenty years from the respective dates of the policies were also available by and in favor of J. M. Mertens himself. (See policies, pages 42, 47, 51.) That is, all benefits and privileges under these policies, whether under the insurance feature or the investment feature, were unquestionably at the time of the bankruptcy the property of J. M. Mertens.

In this discussion, we may as well limit our investigation to policy No. 274,445, Exhibit No. 5, page 42, for inasmuch as it is a type of the others, whatever decision is applicable to it must be applicable also to the others. This policy was issued March 8, 1884. It is called a Semi-Tontine Policy. It insured the life of J. M. Mertens for $20,000, payable to "Jacob M. Mertens, his executors, administrators or assigns." The premium is payable semi-annually in the amount of $293.00.

It does not provide for any cash surrender value, but on the contrary it expressly declares (see endorsements, bottom page 46), "No dividend will be declared on this Policy until the 8th day of Mch., 1904." It also provides that in case premiums have been paid for at least three years, the Company, *in case the policy becomes void because of default in payment of premium, will issue a new paid-up policy.* (Page 43.)

It will be especially noted that such paid-up policy:—

1. *Will be without participation in profits*: That

is, in case such a surrender is made, all right to participation in profits will be lost. (Page 43.)

2. Such paid-up policy will be available only in case the policy is surrendered after (and within six months from the time when) a default has been made in the payment of premium. (Page 43.)

But aside from the life insurance features, this instrument constitutes an investment. It provides that the tontine period shall expire Mch. 8, 1904, and says expressly,

"3. That no dividend shall be allowed or paid upon this policy unless the person whose life is hereby assured shall survive the completion of its Tontine Dividend Period as aforesaid, and unless this policy shall then be in force." (Third provision, page 43.)

"4. *That all surplus or profits derived from such Policies on the Semi-Tontine Plan, as shall not be in force at the date of the completion of their respective Tontine Dividend Periods, shall be apportioned among such policies as shall complete their Tontine Dividend periods.*" (Fourth provision, page 43.)

It then provides by Section 5, page 44, four different options which are available at the end of the twenty-year period, provided J. M. Mertens be living, and each of these options is available to J. M. Mertens himself and the sums provided to be paid thereby are payable to Jacob M. Mertens.

It will be noted that:—

a. *The petition in bankruptcy* (involuntary in form) was presented to the Court and the order made appointing the receiver herein on *August 18, 1903,* the petition being filed with the Clerk at Utica on August 20, 1903. (Page 40.)

b. *The adjudication* in bankruptcy was made *September 15, 1903.* (Page 39.)

c. *On September 8, 1903, the receiver paid the last premium necessary to mature the policy to the end of the twenty-year or tontine period.* (Page 22.) *By that payment it became certain that the policy in question would:—*

1. *In case J. M. Mertens died between September 8, 1903, and March 8, 1904, be worth $20,000, the amount payable in case of his death.*

2. *In case he did not die the policy would be worth as much as the most favorable option was worth.* Under the first option specified in the policy, the Company agreed to pay at least $6046.40, plus the surplus apportioned to the policy (page 44), *which as hereafter shown would make a total of $11,318.40.* (Page 33.)

On the hearing before the referee, the bankrupt offered oral evidence as to the terms and conditions of these policies. (Page 23.) That testimony was given by Mr. Brainerd and it appears therefrom that the surplus which would be apportioned to the policy in question, would

amount to sufficient so that with the $6046.40, specified above, the total amount which the Company would pay, in case the first option were exercised on March 8, 1904, would be $11,318.40. (Page 33.) In other words, on March 8, 1904, Mr. Mertens had he not become bankrupt could have surrendered this policy and received from the Company $11,318.40 in cash. Mr. Brainerd further testified that the amount which the Company would have paid for a surrender thereof on September 8, 1903, in case the premium had not been paid on that day, and in case the policy had lapsed, would be only $5905.65. (Page 31.) *In other words, by the simple payment of $293.00 which the receiver made on this policy on September 8, 1093, it increased in value, so far as moneys obtainable from the Company were concerned, from $5905.65 to $11,318.40, it being necessary in order to obtain the larger sum to wait only the six months and to have Mr. Mertens live for that period.*

It appears from Mr. Brainerd's testimony that his Company never paid any money for the surrender of policies, except after a lapse in the payment of premium (page 29), and that according to his understanding, after such a policy had lapsed the amount which the Company had paid for the same was simply the *same amount that it would have paid if the insured had taken out a paid-up policy according to its terms and had then surrendered the paid-up policy.* (Pages 32, 33.) There is nothing in his testimony from which it is proved or the inference can be drawn that a policy holder had any right which he could legally enforce to compel the Com-

pany to pay a single cent for the surrender of the policy prior to the expiration of the tontine period.

On the contrary, he has testified that the actual value of this policy on September 8, 1903 (page 33), was more than the Company would have paid for it in case the premium due September 8, 1903, had not been paid; and at pages 35 and 37, he testified that the actual cash value of this policy in September, 1903, was not determinable because it could not be figured until the Company had completed the business of the year 1903, so as to determine the surplus.

He says in regard to the policy known as Policy No. 3, Exhibit 6, for which the Company had stated to him that in case of lapse it would pay for a surrender of the same $2272.56, that this same policy had an actual value of at least $5,000 (page 34); and in regard to Policy 4, Exhibit 7, the amount which the Company was willing to pay for a surrender in case of lapse, being $6574, Mr. Brainerd says it had an actual value of at least $12,000. (Page 34.)

He also testified that in case a policy was lapsed and the insured took the amount which the Company would pay for it, then the insured would lose all participation in profits. (Page 34.)

We also call the attention of the Court to the applications of Mr. Mertens made at the time when these policies were taken out, whereby he agreed to waive all claim

to any surrender value other than the paid-up policy provided for by the contract. (page 63.)

From the foregoing facts as shown by the policies themselves and also by the evidence of Mr. Brainerd, it is evident that the bankrupt is not entitled to any interest in these policies and cannot take them from the trustee. This question has never been before this Court, so all our citations are from lower courts; but the question has been expressly decided adversely to the claim of the bankrupt in the cases of

In re Welling, 113 Fed. Rep., 189, C. C. A., 7th Circ.

In re Slingluff, 106 Fed. Rep., 154.

These opinions are so exhaustive and complete, that it is impracticable to quote from them without giving the whole opinions, and we, therefore, refer to the reports with the single statement that these cases hold that the term "cash surrender value" in the Bankruptcy Act refers to a value in cash provided by the terms of the policy itself, and which can be demanded as a contract right by the insured; that it does not mean a sum which the company will voluntarily pay, although not obligated to do so.

In the Welling case, the form of the policy was exactly like the policy here and was issued by the same Company; the only difference was that in that case the insurance was payable to the wife, but in the case at bar the insurance was payable to the estate of the bankrupt; so

that this case is stripped of the complications which arose in the Welling case, because the wife had an interest in that policy, and it will be noticed that the dissenting Judge in the Welling case dissented only because of the wife's interest and was with the majority of the Court upon all the propositions necessary to decide this case here in favor of the trustee.

Although the above cases are clearly directly in point, we submit the following reasons as having some additional bearing upon the questions at issue:

It is not claimed that the policies have by their terms any cash surrender value. On the contrary, that these policies have no cash surrender value by their terms is shown

1. By the endorsement on the cover of the policy: "No dividend will be declared on this Policy until the "8th day of Mch., 1904." (Page 46.)

2. By the third clause of the provisions of the policy: "That no dividend shall be allowed or paid upon this "Policy unless the person whose life is hereby assured "shall survive the completion of its Tontine Dividend "Period as aforesaid, and unless this policy shall then be "in force." (Page 43.)

3. By the fourth clause of said provisions: "That "all surplus or profits derived from such Policies on the "semi-tontine plan, as shall not be in force at the date of "the completion of their respective Tontine Dividend "Periods, shall be apportioned among such Policies as

"shall complete their Tontine Dividend Periods." (Page 43.)

4. By the written applications of Jacob M. Mertens. For example, clause 11 thereof (page 64), which provides that "all right or claim to temporary assurance or "any other surrender value than that provided in the "Policy, shall be specifically waived and relinquished, "whether required by the statute of any State or not."

5. By the definition of the word "tontine" itself, which is given in the Century Dictionary as "Tontine "Policy, a policy of insurance in which the policy holder "agrees, in common with the other policy holders under "the same plan, that no dividend, return premium, or sur-"render value shall be received for a term of years called "the tontine period, the entire surplus from all sources "being allowed to accumulate to the end of that period, "and then divided among all who have maintained their "insurances in force."

Consequently, it is shown by the terms of these policies that they have no cash surrender value. As to the testimony of Mr. Brainerd, we claim:

First, this evidence is not competent to modify the policies under the general rule that oral testimony cannot modify or change a written instrument.

Second, the courts have already decided that "cash surrender value" contemplated by Section 70-a-5 of the Bankruptcy Act, is not a value which may be obtained by

means of negotiation or agreement, but that it is only such a value as can be demanded and legally enforced against an unwilling insurance company. This proposition is held in the Welling and Slingluff cases, above cited, and we also call the Court's attention upon this subject to the opinion in

Pulsiver vs. Hussey, 9 Am. Bank., 657; 97 Maine, 434.

In that case, which was in the Supreme Judicial Court of Maine, the Court held that the policy was covered by the exemptions provided for by the law of Maine and did not pass, but the Court in discussing the above subject holds squarely that the custom of the Company has no effect and is not embraced within the meaning of surrender value used in the Bankruptcy Act (see 9 Am. Bk. Rep., pages 668 and 669.) In that case, it was shown that the Company had a custom of recognizing a cash surrender value, even at times other than on the five year periods provided for in the contract.

Furthermore, even though the testimony of Mr. Brainerd were admissible, we claim that the bankrupt has not made out that these policies have a cash surrender value, because it appears from the evidence that the Company, even under the custom which the bankrupt claims to exist, would pay nothing unless the policies were lapsed. It is an indisputable fact that none of these policies were lapsed. If we look at them with reference to the date when the petition in bankruptcy was presented to the Court (August 18, 1903,) we find that none of the poli-

cies were in default, because the premium on Policy No. 1, Exhibit 4, had been paid to December 21, 1903; the premium on Policy No. 2, Exhibit 5, had been paid to September 8, 1903; the premium on Policy No. 3, Exhibit 6, had been paid to December 23, 1903, and the premium on Policy No. 4, Exhibit 7, had been paid to February 15, 1904, (pages 30, 31); consequently at the time when the petition was filed in August, Mr. Mertens could not have obtained any sum whatever from the Company. Between the date of presenting the petition and the date of the adjudication in bankruptcy, September 15, 1903, the receiver paid the premium on Policy No. 2, Exhibit 5. (Page 22.) If it be held that the title of the trustee relates back to the time of presenting the petition, then the policies were not lapsed; on the other hand, if it be held that the title to the trustee relates back only to the time of the adjudication, then none of the policies were lapsed; so that in any event Mr. Mertens could have received nothing from the Company, either on the date when the petition was presented, or on the date when he was adjudicated a bankrupt.

There is another proposition to be considered: It is the fact that clearly under the terms of the policy and as shown by the evidence of Mr. Brainerd (page 34) these policies, if surrendered, lose all right to participate in profits. What is the result? It is this: We have the bankrupt here claiming that he is entitled to take the policy, Exhibit 5, from the trustee upon paying to him the sum of $5905.65. What is that sum? It is simply the sum which the Company would pay if the policy had

lapsed and had been surrendered. (Page 33.) It does not include any item whatever for the right which this policy, which has not in fact lapsed and which has not been surrendered, has to participate in the profits. *The right to participate in the profits was a part and parcel of the policy and of the privileges enjoyed thereunder.* It was a distinct property right, which was vested in the holder of the policy at the time when the bankruptcy proceedings were begun, and in order to become a fixed right to a definite sum of money, all that was necessary was for it to be continued for a period of six months and for Mr. Mertens to continue living for that time. We take it that the vast amount of difference between the value of this policy, if lapsed on September 8, 1903, given as $5905.65 and its value on March 8, 1904, of $11,318.40, is chiefly made up by the value of this right to participate in profits. *It seems to us, therefore, absurd to claim that the Bankruptcy Law contemplated that such a valuable right, namely, the right to participate in profits, could be absolutely wiped out and taken away from the trustee in such a case as this, by allowing the bankrupt to take up the policy by paying what the bankrupt here claims to be the surrender value.*

It appears from the evidence of Mr. Brainerd (page 37), that the actual cash value of this policy was not determinable in September, 1903, and could not be determined until the Company's business for 1903 had been closed. It seems to us that in that fact lies conclusive proof that this policy did not have the cash surrender value contemplated by the statute, because it was impos-

sible to determine that value at the time of the bankruptcy and, consequently, the bankrupt could not pay it in to the trustee and take over the policy; that is, he could not pay an indeterminate sum.

In the Court below, the case was decided entirely upon the strength of the remark of the Supreme Court in Holden vs. Stratton, 198 U. S., 214. The question in that case was of exemption of a life insurance policy under the statute of Iowa, and it is quite clear that the part of the opinion which was followed is purely *obiter,* and the Supreme Court said that it did not intend to decide the question. Furthermore, the peculiar nature and qualities of a tontine policy were not developed and no such facts were brought to the Court's attention as the evidence in this case shows.

In the Court below the bankrupt made much of the cases of *In re* McKinney, 15 Fed. Rep., 535, and *In re* Coleman, 136 Fed. Rep., 818, and we anticipate he will do so here; but we are unable to see that the McKinney case is any authority for the bankrupt. A reading of the opinion will show that the Court gave to the trustee a sum equal to the highest actual value that could be attributed to the policy at the time of the adjudication, and the part which was refused to the trustee was simply the value which was created by the payment of premiums by the widow after the adjudication. To us the case seems to hold only that property acquired after the adjudication is not assets, which is a proposition well established and one with which we have no dispute. As to the claim that the trustee could not continue to pay the premiums, we

refer to that part of Judge Ray's opinion, which appears at page 89. So far as we can observe, the only rule which has been established by the Courts in any cases cited by the bankrupt below, is that the policies are assets in the hands of the trustee and that he is to get from them, by whatever method is most available, the greatest amount of money which they are capable of producing.

Moreover, the McKinney and Coleman cases did not arise in reference to a tontine policy; in the Boardman case (also cited by the bankrupt in the Court below) the trustee, without controversy, agreed to the position which the bankrupt takes in this case; Warnock vs. Davis, also cited by the bankrupt, has no applicability to policies such as these where they are investments, and the case is no authority for claiming that a trustee in bankruptcy or a purchaser from him cannot legally hold a policy issued to the bankrupt.

In any one of the cases where the Court has allowed the trustee to take the cash surrender value of a policy, including the cases cited by the bankrupt below, it has been quite clear that the cash surrender value equalled the actual value.

The bankrupt below contended that the trustee had no right to speculate upon the life of the bankrupt. Speculation is entirely unnecessary, because it is quite clear that these policies if put up at auction immediately would have a much larger value and would bring a larger amount than that for which the bankrupt wishes to obtain them.

Mr. Brainerd testified that the policy was worth more than the Company would pay (page 34) and that there is a market for such policies at prices above the amounts offered by the Company. (Page 33.)

Would there be any speculation in the trustee putting up at auction this policy the day after the adjudication in bankruptcy, on September 15, 1903, at which date it was assured that within six months the policy would be worth $11,318.40, according to Mr. Brainerd's figures, if Mr. Mertens lived, and if he died $20,000? And yet the bankrupt says that the Bankruptcy Act intended to give him the right by the payment of $5905.65 and an additional premium of $293 to take this policy and be assured of this great profit in the course of six months, from a contract which was absolutely the bankrupt's at the time of the adjudication. Such is not the theory of the Bankruptcy Act which, in short, is to absolve debtors from their debts, provided they give up all their property, but not to release them from their debts and let them retain for themselves contracts worth thousands of dollars.

POINT II. These policies did pass to the trustee. The claim of the bankrupt that policies which have no cash surrender value do not pass to the trustee, is not well taken.

The bankrupt, by his answer (pages 15 and 17) and in his argument in the Court below, having argued and

claimed that the policies did have a cash surrender value which was the small sum obtainable from the insurance company therefor, also inconsistently with that argument claimed that the policies had no cash surrender value whatever and that they consequently did not pass to the trustee and that the trustee never had any interest whatever therein. Assuming that the same argument will be made in this Court, we anticipate it.

This argument is based upon the contention that the real meaning of the proviso in Section 70-a-5 is that no insurance policies pass to the trustee except those which have a cash surrender value. This contention seems groundless, because Subdivision 5 of Section 70a of the Bankruptcy Act is general in its terms, and provides that the trustee shall be vested with "property "which prior to the filing of the petition he could by any "means have transferred or which might have been levied "upon and sold under judicial process against him"; then follows the proviso as to insurance policies which is quoted at the head of the last point.

We are unable to understand that part of the bankrupt's contention which is based upon the technical wording of the proviso, w' reby he claims that in said proviso it is implied that (y policies having a cash surrender value pass to the tr stee. A reading of the section, even if the language of t e Act is to be followed literally, does not seem to indicate that any exception is made other than of policies having a cash surrender value. We are unable to discover anything which says that policies not

having a cash surrender value do not pass. The general phraseology of the section seems to cover them absolutely, and the only exception contained in the proviso relates to policies having a cash surrender value.

It seems perfectly clear from the foregoing provisions of the Bankruptcy Act that these policies did, in fact, constitute assets and did pass to the trustee. It is quite clear that they had an actual value, not only from the terms of the policies themselves, but also from the testimony of Mr. Brainerd, and it further appears that they come expressly within the first part of Subdivision 5, namely, property which could have been transferred, because it appears from the evidence that these policies not only could have been transferred but were, as a matter of fact, prior to the bankruptcy, transferred by Mr. Mertens as security for loans, Policy No. 1 and Policy No. 4, Exhibits 4 and 7, having been transferred to the Varick Bank as security for its claims (page 21), and Policy No. 2, Exhibit No. 5, having been transferred to The Equitable Life Assurance Society as a security for a loan of $2500, and Policy No. 3, Exhibit No. 6, having been also transferred to The Equitable Life Assurance Society as security for its loan of $1775 (page 22); consequently, these policies being assignable, came expressly within Subdivision 5 of Section 70a.

Furthermore, it has been distinctly held that the proviso in that Subdivision does not prevent the vesting of insurance policies in the trustee but simply gives the bankrupt a right to redeem them from the trustee. This proposition has been expressly decided in the following

cases, the policy in the first case cited having been issued by the same company and being the same kind of a policy as the policies in question here:

In re Welling, 113 Fed. Rep., 189.
In re Slingluff, 106 Fed. Rep., 154.

There has never been any case where it has been decided that policies or property of any kind which had an actual value and which were not covered by Section 6 of the Bankruptcy Act, relating to exemptions, did not pass to the trustee. There are one or two cases which the reporters have held out in notes as holding that life insurance policies did not pass to the trustee, which cases were cited below by the bankrupt; but an inspection of those cases will show that they do not hold such a proposition. It is only where policies have been of such a nature that they had not only no cash surrender value, but no actual value and no value for any purpose whatever, that the Court has held that policies were not assets and did not pass to the trustee, the reason being that they were absolutely worthless.

These policies having, as is clearly shown (pages 33, 34) an actual value, did pass to the trustee, as has been decided in the cases above set forth. We cite the following from *In re Welling,* 113 Fed. Rep., 193:

"But it does not follow, as was assumed by the Court "below, and by the referee, that, because the policy does "not fall within the terms of the proviso, the bankrupt "has not property therein which passes to his trustee. "By the terms of the policy he was entitled to receive at

"the end of the tontine period the cash payment stipu-
"lated in the contract. That is a vested contract right,
"contingent only upon his surviving the tontine period.
"The right is valuable, increasing in value with each suc-
"cessive payment of premium. The policy, technically,
"had not a 'surrender value', within the meaning of the
"proviso; but it had an actual value, and that valuable
"right was right of property existing in the bankrupt.
"It is the plain provision of the bankruptcy law that all
"the estate of the bankrupt shall, by operation of law,
"be vested in the trustee, save such as is specifically ex-
"cepted by the provisions of the Bankrptcy Law, or by
"the law of the domicile of the bankrupt. The language
"of the provision is comprehensive. Subdivision 5, of
"Section 70a, declares that there shall be thus vested in
"the trustee 'property which prior to the filing of the
"petition he could by any means have transferred or
"which might have been levied upon and sold under
"judicial process against him'. Then follows the proviso
"which we have considered. It is clear that this proviso
"merely defines a certain class of insurance which may be
"excepted and exempted, by the action of the bankrupt,
"and upon the conditions stated, from the general prop-
"erty which by the law is vested in the trustee. In other
"words, the proviso is in the nature of a privilege to the
"debtor to retain such specified insurance upon yielding
"to the trustee the cash surrender value of the policy at
"the time of adjudication. All other property of the
"bankrupt, including all insurance owned by him, which
"does not fall within the provisions of the proviso, passes
"to the trustee. The statute cannot legitimately be con-

"strued to mean that a policy does not vest in the trustee "except it have a cash surrender value, and that such "may be rescued by the bankrupt upon the terms stated. "The meaning of the provision is clear,—that all the "property of the bankrupt except that specified in the "proviso, shall be vested in the trustee, and that also "shall pass unless the bankrupt avail himself of the priv- "ilege granted him by the law. The contract in question "gives to the bankrupt the right to receive at a certain "date a specified sum of money, contingent upon his sur- "viving to that date. This is a vested right of property "existing in the bankrupt, which passes to the trustee. "It is a property right which he could have transferred, "and it falls within the comprehensive language of the "section which vests title in the trustee."

The same doctrine is held

In re Slingluff, 106 Fed. Rep., 154,

where the whole question is very fully and ably discussed. We also cite

In re Holden, 113 Fed. Rep., 141,

which holds that an endowment or semi-tontine policy, issued by the Northwestern Insurance Company, is assets. Also

In re Scheld, 104 Fed. Rep., 870-872.

Whenever the bankrupt claims that a part of his property does not pass to the trustee by virtue of the bankruptcy proceedings, the burden of showing that claim to be well founded is upon the bankrupt, because it is the theory of the Bankruptcy Act to grant immunity from

debt to the bankrupt upon his surrendering all his property. Manifestly any exception, under which the bankrupt, while still claiming the discharge of his debts, seeks to retain his property, must be very clear, explicit and convincing, and the burden is upon him to show such exception. In case of any doubt, the benefit thereof should be given to the trustee.

In re Turnbull, 106 Fed. Rep., 667.

All of the cases which were cited by the bankrupt relating to this point in the Court below, were subject to the same criticism which we raised in the foregoing point, for none of those cases hold that a policy having any actual value does not pass to the trustee. Every case in the books, so far as we have been able to find, is an authority for the proposition that where a policy has any actual value it passes to the trustee and the trustee can hold it; consequently they hold that the trustee has an insurable interest and that it is not against public policy for him to hold such policies. They are, therefore, all authorities against the proposition which the bankrupt in the Court below claimed was laid down in Warnock vs. Davis, 104 U. S., 775, which we maintain is no authority whatever for the proposition that a trustee in bankruptcy or his assignee is incapable of holding a policy which has been regularly issued by a company to the person upon whose life the same is written. To sustain the contention of the petitioner would be to hold that nothing could be obtained by a bankrupt's creditors from the bankrupt's life insurance contracts, no matter how valuable the same might be. On the other hand, it is well settled that poli-

cies of insurance are assignable and are valid in the hands of the assignee.

St. John vs. American Life Insurance Co., 13 N. Y., 31.

Valton vs. National Fund Life Assurance Co., 20 N. Y., 32.

Dannhauser vs. Wallenstein, 169 N.Y., 199.

Steinback vs. Diepenbrock, 158 N. Y., 24.

In reference to two of the cases which were cited below by the bankrupt, the Court says in Steinback vs. Diepenbrock, at page 31, "Cammack vs. Lewis (15 Wall., 643) "and Warnock vs. Davis (104 U. S., 775) were cases "where the policies were taken out in order that they "might be assigned to the assignees through their pro- "curement, under circumstances that might well be held "to be in evasion of the law prohibiting gaming policies."

The policies in question were all issued by a company incorporated under the Laws of New Work and Mr. Mertens was a citizen of New York, and it is therefore contended that these policies must be construed according to the Law of New York.

The order and decree of the Circuit Court of Appeals should be reversed, and the order and decree of the District Court affirmed, with costs, and the case remanded with instructions to the Courts below to proceed accordingly.

All of which is respectfully submitted.

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